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No. 10-454

IN THE

Supreme Court of the United States

ARIZONA CATTLE GROWERS ASS'N,
Petitioner,

v.

KEN SALAZAR, *et al.*,
Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CENTER FOR BIOLOGICAL DIVERSITY

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QUESTIONS PRESENTED

1. Did the court of appeals err by approving the U.S. Fish and Wildlife Service's "baseline" approach to analyzing the economic impact of a "critical habitat" designation rule under the Endangered Species Act, which precludes consideration of economic impact when listing species, but requires it for critical habitat designations?

2. Did the court of appeals err by refusing to set aside the Fish and Wildlife Service's highly technical and fact-specific designation of the boundaries of "critical habitat" for the Mexican spotted owl?

RULE 29.6 STATEMENT

Respondent Center for Biological Diversity is a nonprofit, non-stock corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

Petitioner, the Arizona Cattle Growers Association ("Cattle Growers"), advances two arguments to support its petition, neither of which makes a compelling case for granting it. Claiming there is a disagreement between the Ninth and Tenth Circuits, the Cattle Growers first ask the Court to reverse the court of appeals' approval of the "baseline" approach used by the U.S. Fish and Wildlife Service (FWS) to assess the economic impacts of "critical habitat" designations under the Endangered Species Act (ESA). The Tenth Circuit's 2001 rejection of the baseline approach, however, was based on a now-defunct regulatory definition that was subsequently found unlawful, thereby removing a key premise of the Tenth Circuit's decision. Unless and until the Tenth Circuit considers the issue again and adheres to its earlier decision even in the face of the invalidation of the underlying regulation, any suggestion that there is a current circuit-split is unwarranted, especially since every court outside the Tenth Circuit to consider the issue since the regulation was set aside has approved the baseline approach.

As all those courts have found, the baseline approach is the only approach consistent with the statutory scheme of the ESA, which forbids FWS from considering economic impacts when determining whether to list a species as threatened or endangered, while requiring the agency to take into account the economic impact of critical habitat designations. The baseline approach, which considers the incremental economic impacts attributable to habitat designation, but not the effects that are attributable to the listing of the species and will occur regardless

of the habitat designation, logically follows from the plain statutory text.

Second, the Cattle Growers ask this Court to delve into the administrative record to assess whether the areas determined by FWS to be "occupied" by the Mexican spotted owl (Owl) are indeed occupied and thus properly included in the Owl's critical habitat designation. FWS's factual determination as to which areas are "occupied" by a mobile wildlife species such as the Owl is dependent on the agency's technical knowledge and expertise, and so is entitled to a high degree of deference. Contrary to the Cattle Growers' argument, the court of appeals' findings that Owls use habitat outside their known nesting locations (which are referred to as "Protected Activity Centers," or "PACs") for foraging and other uses besides nesting, and that there are likely Owl nesting sites beyond existing designated PACs, were based on reasons given by FWS itself in the final critical habitat rule, and were not new "rationales" created by the court. The Court should therefore decline the Cattle Growers' invitation to wade into the fact-bound question of what public lands the Owl occupies.

STATEMENT OF THE CASE

The Cattle Growers' statement of the case is incomplete and inaccurate in several important respects.

FWS designated the Owl as threatened with extinction in 1993, and thus the designation of critical habitat was statutorily required since at least 1994. 16 U.S.C. § 1533(a)(3). FWS limited the Owl's 2004 critical habitat rule to only federal lands, and the designation includes only 8.6 million of the more

than one hundred million acres of federal lands in Arizona, New Mexico, Utah, and Colorado. On these 8.6 million acres of federal lands, activities are not necessarily foreclosed, as the action agency must only consult with FWS to insure that any proposed action is not likely to jeopardize the continued existence of the Owl, or result in the "destruction or adverse modification" of its critical habitat. 16 U.S.C. § 1536(a)(2). On private lands, the 2004 critical habitat rule does not add to the restrictions resulting from the Owl's designation as a threatened species (*e.g.*, limitations on "taking" members of the species).

The 2004 critical habitat rule is the third such rule for the Owl, after the first two were struck down for various legal infirmities. Pet. App. 3. The 2004 rule's designation constituted a significant reduction from the 13.5 million acres that the FWS had proposed to designate.

FWS contracted with a private firm, Industrial Economics, to prepare a detailed economic analysis of the proposed critical habitat designation for the Owl. *See* Pet. App. 78-79, 307-08. FWS released a draft economic analysis for public review and comment, and "solicited information and comments from representatives of Federal, State, Tribal, and local government agencies, as well as some private landowners, and requested comments from all interested parties, including landowners." Pet. App. 147-48. The report was also "reviewed by three independent technical advisors." Pet. App. 168.

Contrary to the Cattle Growers' assertion that "FWS ... determined that no economic costs would be imposed on land or resource users" (Pet. at 3), the economic analysis in fact found several millions of

dollars of economic impact from the critical habitat rule, including "annual regional economic impact of up to $0.7 million" to livestock production (the concern of the Cattle Growers). Appellant's Excerpts of Record at 442. The Cattle Growers, however, do not include any of this 120-page economic analysis in the appendix to their petition, and cite only to the final rule. *See* Pet. at 3. But even the cited pages of the final rule state only that there would be *less than $100 million dollars in impact per year*, which is the threshold for "significance" under Office of Management and Budget rules, not that the habitat designation entailed *no* costs. Pet. App. 309.

Also inaccurate is the Cattle Growers' assertion that the court of appeals affirmed FWS's habitat designation on the basis of factual findings not found in the administrative record. On the contrary, the court of appeals' findings that Owls use lands outside of PACs (known nesting areas designated for special protection) for essential needs like foraging (*i.e.*, hunting and eating), and that there are likely many other nesting areas beyond existing PACs, were not new rationales invented by the court, but reflected key aspects of the FWS's reasoning in the final critical habitat rule, which found ample support in the administrative record. Pet. App. 88, 90-93, 100-01, 218-121, 420.

REASONS FOR DENYING THE WRIT

I. The Baseline Approach is Proper, and No Real Circuit Split Exists.

Under the ESA, FWS may not consider economic impacts when determining whether to list a species as threatened or endangered, but must consider economic impacts when designating critical habitat for a

listed species. 16 U.S.C. § 1533(b). In light of these statutory commands, the FWS' "baseline" approach to economic analysis for critical habitat designations is the only approach that makes sense in carrying out the ESA. The only circuit to reject the baseline approach, the Tenth Circuit, did so based on an erroneous FWS regulation that was later set aside. Since that regulation was set aside, every court outside the Tenth Circuit has upheld the baseline approach, and there is no reason to believe that the Tenth Circuit would now reject the baseline approach in light of the elimination of a central premise of its earlier decision. The Cattle Growers' claim that there is a current and ongoing conflict between the circuits is thus unfounded.

A. The Cattle Growers' Claim of a Circuit-Split Regarding the Baseline Approach is Speculative.

The Cattle Growers assert that the Ninth and Tenth Circuits disagree about the lawfulness of the "baseline" approach, based on the Tenth Circuit's 2001 decision in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). As a number of courts have explained, however, the underlying rationale for the Tenth Circuit's rejection of the baseline approach in *New Mexico Cattle Growers* was subsequently eliminated by the Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), setting aside a regulatory definition that lay at the heart of the Tenth Circuit's analysis, and courts have consistently upheld FWS's use of the baseline method ever since. Because the Tenth Circuit has not addressed the question since *Gifford*

Pinchot, there is not currently a true conflict between the circuits. Given the importance of the regulation set aside in *Gifford Pinchot* to the reasoning of *New Mexico Cattle Growers*, moreover, it is unlikely that the Tenth Circuit would now reject the baseline approach. At a minimum, the Tenth Circuit should be afforded the opportunity to revisit its position in *New Mexico Cattle Growers* in the wake of *Gifford Pinchot* before this Court tackles this still-evolving issue.

1. FWS's Definition of "Adverse Modification" and "Jeopardy" at the Time of the Tenth Circuit's Decision in *New Mexico Cattle Growers*

Section 7 of the ESA requires federal agencies to ensure that any action is not likely to (1) jeopardize the continued existence of any threatened or endangered species, or (2) result in the destruction or adverse modification of the species' critical habitat. 16 U.S.C. § 1536(a)(2). Under this two-prong standard, "jeopardy" is thus focused on impacts to listed species, while "adverse modification" is focused on impacts to the listed species' critical habitat.

In 1986, however, FWS promulgated a regulation that defined "jeopardize the continued existence" of a species and "destruction or adverse modification" of critical habitat to be essentially the same. "Destruction or adverse modification" was defined as an alteration that appreciably diminishes the value of critical habitat "for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. Similarly, "jeopardize the continued existence of" was defined as an action that reasonably would be expected to reduce appreciably the likelihood "of both the survival and recovery of a listed species." *Id.* Thus, to trigger ei-

ther "jeopardy" (of a species) or "adverse modification" (of critical habitat), the regulations required an action to appreciably affect *both* "survival and recovery." *Id.*

The FWS's regulatory definitions of jeopardy and adverse modification became known as the agency's policy of "functional equivalence," in which the ESA's prohibition of actions that jeopardize listed species was virtually identical to the statute's ban on actions that adversely modify critical habitat. As a result of this policy, FWS came to view critical habitat designations as serving only "a minimal additional function separate from the listing," *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004), and as "unhelpful, duplicative, and unnecessary." *New Mexico Cattle Growers*, 248 F.3d at 1283.

2. *New Mexico Cattle Growers*

In *New Mexico Cattle Growers Association*, the plaintiff challenged the critical habitat designation for the Southwestern willow flycatcher. 248 F.3d 1277. FWS had used the "baseline approach" to calculate the economic costs of protecting critical habitat from "destruction or adverse modification," thus taking into account only those economic impacts rising above the baseline of protecting the species itself from jeopardy of extinction. *Id.* at 1280. The Tenth Circuit held that in light of the regulatory framework then in place defining the significance of the listing and critical habitat determinations, the baseline approach to the economic impact analysis for a critical habitat determination was impermissible. *Id.* at 1281.

Critical to the court's reasoning was that, under the regulation described above, FWS took the position that a critical habitat designation resulted in *no additional protection* for a listed species above and beyond the decision to list the species as threatened or endangered. *Id.* at 1283-84. As the court explained, "[t]he root of the problem" was that the agency took the "policy position" that the critical habitat determination was superfluous, a policy position that in turn rested on the regulation that defined species jeopardy and adverse habitat modification in such a way that "the standards are ... virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy)." *Id.* at 1283. Because all actions that would result in the adverse modification of critical habitat would also result in a jeopardy decision, the application of the baseline approach inevitably led FWS to find that the critical habitat designation was "not expected to result in *any* incremental restrictions on agency activities." *Id.* at 1284 (emphasis added).

In other words, given FWS's regulation equating the effects of listing and habitat designation and FWS's attribution of all economic impacts to the former, the baseline approach had the effect of rendering the statutorily required consideration of the economic impact of habitat designation a nullity because, by definition, habitat designation would never, or virtually never, have any incremental economic impact. *See id.* As the court put it, "the regulation's definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless." *Id.* at 1285. As the court recognized, however, "[t]he statu-

tory language is plain in requiring some kind of consideration of economic impact in the CHD phase," and thus the court was "compelled by the canons of statutory interpretation to give *some effect* to the congressional directive that economic impacts be considered at the time of critical habitat designation." *Id.* (emphasis added). Thus, the court concluded that the baseline approach conflicted with the statutory requirement of consideration of the economic impacts of habitat designation *"[b]ecause economic analysis done using the FWS's baseline model is rendered essentially without meaning by 50 C.F.R. § 402.02."* *Id.* (emphasis added).

3. *Gifford Pinchot Task Force*

Critically, the Tenth Circuit stressed that the validity of § 402.02, the regulation that it recognized as the "root" of the problem, *id.* at 1283, and whose existence was the very reason it gave for rejecting the baseline approach, *id.* at 1285, was not before it in *New Mexico Cattle Growers*, although the court strongly hinted that it viewed the regulation as unlawful. *See id.* at 1283 & n.2, 1285. Three years later, the issue of the regulation's validity was squarely presented to the Ninth Circuit in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, and the court held the regulation's definition of adverse habitat modification unlawful under the ESA. *Gifford Pinchot* led FWS to officially change its policy and begin recognizing the increased protection provided to listed species as the direct result of critical habitat designations. Appellees' Supp. Excerpts of Record at 1.

More specifically, the Ninth Circuit in *Gifford Pinchot* held that FWS had misinterpreted the ESA's

definition of "destruction or adverse modification" of critical habitat, and had thus overlooked the importance of critical habitat to the recovery of listed species. 378 F.3d at 1069-70. As the court noted, "the ESA was enacted not merely to forestall the extinction of species (*i.e.*, promote a species survival), but to allow a species to recover to the point where it may be delisted." *Id.* at 1070, *citing* 16 U.S.C. § 1532(3). Because Congress intended critical habitat to include lands that are necessary not only for a species' survival, but also essential to its recovery, the court determined that FWS had unlawfully restricted its definition of adverse modification, and thereby decreased the value and importance of critical habitat designations for species' conservation and recovery. *Id.*

Following the *Gifford Pinchot* decision, FWS developed new uniform, national guidance to recognize that the adverse modification of critical habitat may result from impacts that diminish the value of the habitat for conservation and recovery (as opposed to impacts that adversely affect the survival of a species). Appellees' Supp. Excerpts of Record at 1. As a result, FWS's definition of adverse modification of critical habitat is no longer the functional equivalent of species jeopardy, and therefore the designation of critical habitat results in increased protections for species above and beyond the protections that became applicable upon the listing of the species. Thus, a "baseline" economic analysis is no longer "meaningless," but is instead the most logical way to measure the true costs of a critical habitat designation.

4. Court Decisions Outside the Tenth Circuit Subsequent to the *Gifford Pinchot* Decision

Following the *Gifford Pinchot* decision, courts have consistently rejected attacks on critical habitat determinations that rely on the Tenth Circuit's now outdated *New Mexico Cattle Growers* decision. For instance, in *Cape Hatteras, supra*, a critical habitat designation was challenged in part because FWS had utilized the "baseline" approach. 344 F. Supp. 2d at 127. The court agreed with *Gifford Pinchot*'s holding (and *New Mexico Cattle Growers*' suggestion) that FWS's regulation equating adverse habitat modification with species jeopardy unlawfully rendered critical habitat designation superfluous. *See id.* at 127-29. Once the regulation was set aside, however, the court recognized that the baseline approach was no longer meaningless because critical habitat designation would offer protection going beyond mere listing. Indeed, the court stated, "[t]he baseline approach is a reasonable method for assessing the actual costs of a particular critical habitat designation," as in order to determine the true costs of a designation, "the world with the designation must be compared to the world without it." *Id.* at 130. Moreover, the court reasoned, any other approach would conflict with the statute: FWS "must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat," as "[t]hat would be inconsistent with the ESA's prohibition on considering economic impacts during the species listing process." *Id.*

Another critical habitat designation was at issue in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1142 (N.D. Cal.

2006), where the defendants cited *New Mexico Cattle Growers* to argue that FWS was permitted to consider costs attributable to listing in making its critical habitat determination. *Center for Biological Diversity*, 422 F. Supp. 2d at 1151. Noting that *New Mexico Cattle Growers* predated the Ninth Circuit's invalidation of the key regulatory definition in *Gifford Pinchot*, the court stated that it "agrees with the reasoning and holding of *Cape Hatteras Access Preservation Alliance*." *Id.* at 1152. Specifically, the court agreed with *Cape Hatteras* that "the baseline approach was both consistent with the language and purpose of the ESA and that it was a reasonable method for assessing the actual costs of a particular critical habitat designation," *Id., citing Cape Hatteras*, 344 F. Supp. 2d at 130.

In *Fisher v. Salazar*, plaintiffs similarly challenged a critical habitat designation, in part due to FWS's economic analysis. 656 F. Supp. 2d 1357 (N.D. Fla. 2009). As in other cases postdating *Gifford Pinchot*, the court explained that FWS's use of the "functional equivalence theory," which the Tenth Circuit had relied on in finding fault with the baseline approach, had now been abandoned in the wake of *Gifford Pinchot*. *Id.* at 1369-71 ; *see also id.* at 1370 (noting that "[i]n reaching its no-economic result [in *New Mexico Cattle Growers*], the FWS used a baseline approach in the context of its functional equivalence theory"). The court agreed that once the functional equivalence theory was rejected—resulting in critical habitat that provides additional protection for species above and beyond the initial listing—the baseline approach became reasonable and consistent with the ESA:

> The courts in *Cape Hatteras, Arizona Cattle,* and *Center for Biological Diversity*, all determined—and this court agrees—that the baseline approach is a reasonable method, consistent with the language and purpose of the ESA, for assessing the actual costs of a particular habitat designation. Congress specified that, when deciding whether or not to designate critical habitat, the FWS shall take into consideration "the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). ... Costs that exist independently of the critical habitat designation cannot be costs "of specifying any particular area as critical habitat." Such independent costs represent a baseline that must not influence the decision to designate or not designate areas as critical habitat.

Id. at 1371. As the court further pointed out, the Fifth Circuit has also rejected the "functional equivalency theory," which indicates that if the Fifth Circuit, too, were faced with whether to accept the baseline approach, it would logically be compelled to do so. *See id.* at 1369, citing *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001).

Similarly, both the Ninth Circuit and the district court in this case offered well-reasoned explanations for their conclusion that *New Mexico Cattle Growers*' reasoning did not survive the decision in *Gifford Pinchot*. Pet. App. 29-30, 71-78. As both courts explained, *Gifford Pinchot* eliminated the basis of *New Mexico Cattle Growers* by invalidating the functional equivalence of the jeopardy and adverse modification standards, which had, in the Tenth Circuit's view,

rendered the baseline approach meaningless. Pet. App. 30, 76. As the district court explained, the result of the revitalized definition of adverse modification following the *Gifford Pinchot* decision is that FWS must now consider recovery when consulting on critical habitat, and therefore "additional economic impacts will be associated with Section 7 consultations concerning critical habitat." *Id.* at 76. Consideration of only those impacts that are attributable to habitat designation as opposed to listing is thus both meaningful and, as the Ninth Circuit emphasized, the most logical approach to carrying out the statutory command that the agency consider the impacts of habitat designation but not of listing. *Id.* at 30-31.

The Ninth Circuit again upheld the baseline approach in *Home Builders Association of Northern California v. U.S. Fish & Wildlife Service*, noting that "the plain language of [the] ESA directs the agency to consider only those impacts caused by the critical habitat designation itself." 616 F.3d 983, 992 (9th Cir. 2010) (citing 16 U.S.C. § 1533(b)(2) (requiring the agency to consider "the economic impact ... of specifying any particular area as critical habitat")). In sum, all courts outside of the Tenth Circuit have upheld the baseline approach since the Ninth Circuit's decision in *Gifford Pinchot*, which eliminated the primary rationale for the Tenth Circuit's rejection of the baseline approach.

5. The Tenth Circuit Has Not Addressed This Issue Following *Gifford Pinchot*, and Thus the Cattle Growers' Claim of a Circuit-Split Is, at Best, Premature.

Despite the repeated decisions sustaining the baseline approach in the wake of the Ninth Circuit's decision in *Gifford Pinchot*, the Cattle Growers argue that the Tenth Circuit "has not overruled or modified *New Mexico Cattle Growers*." Pet. 25. Although one district court within the Tenth Circuit has recently relied on the *New Mexico Cattle Growers* decision, the Tenth Circuit has had no opportunity to revisit this issue subsequent to the Ninth Circuit's decision in *Gifford Pinchot*.

Because the courts outside of the Tenth Circuit have consistently upheld the baseline approach subsequent to the Ninth Circuit's decision in *Gifford Pinchot*, and the Tenth Circuit has not had the opportunity to reconsider the issue, it is possible and even likely that, if given the opportunity, the Tenth Circuit would similarly revisit its decision in *New Mexico Cattle Growers* and reach a different outcome. With the "root of the problem" addressed by the Ninth Circuit's rejection of FWS's definition of adverse modification (*see New Mexico Cattle Growers*, 248 F.3d at 1283), an economic analysis under the baseline approach is no longer "rendered essentially meaningless by 50 C.F.R. § 402.02," and the rejection of the baseline approach is no longer even arguably necessary to give "some meaning" to the statutory requirement that the agency consider the economic impacts of critical habitat designations. *Id.* at 1285. Unless and until the Tenth Circuit rejects the baseline approach even after *New Mexico Cattle Growers*'

underlying premise has been eliminated—which is an unlikely prospect—the assertion that there is a conflict among the circuits requiring resolution by this Court is merely speculative.

B. FWS's "Baseline" Approach for Assessing the Economic Impacts of a Critical Habitat Determination is the Only Approach Consistent with the ESA.

"Under [the baseline] approach, any economic impacts of protecting the owl that will occur regardless of the critical habitat designation—in particular, the burdens imposed by listing the owl—are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation." Pet. App. 29. The court of appeals recognized that the baseline approach is not only a logical approach for determining the economic impacts of the critical habitat designation, but is also entirely consistent with the ESA. Pet App., 30-31 (finding that the baseline approach is "more logical" than the "co-extensive" approach, and reflects the purpose of the ESA).

Section 4 of the ESA governs the listing of species as threatened or endangered, as well as the designation of their critical habitat. 16 U.S.C. § 1533(a). Congress made an important distinction between listing decisions and critical habitat designations in terms of whether economic impacts may be considered. When determining whether a species should be listed as threatened or endangered, FWS must make the decision "solely on the basis of the best scientific and commercial data available to him," and is precluded from factoring into the decision the potential economic impacts of the listing determination. 16

U.S.C. § 1533(b)(1)(A). By contrast, FWS's critical habitat designations are to be based on the best scientific data available "and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C § 1533(b)(2).

Congress thus struck a careful balance in requiring that FWS consider only the best available science in determining whether a species should be listed and protected under the Act, but then requiring FWS to take into account the economic impact "of specifying any particular area as critical habitat" when providing the additional protections that flow from the critical habitat determination. 16 U.S.C. § 1533(b). FWS's baseline approach walks this line precisely as intended by Congress, by weighing only the actual economic costs of "specifying a particular area as critical habitat," and not including the economic impacts associated with the listing determination in its final critical habitat determination. *See id.*

Indeed, as the Ninth Circuit pointed out, "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made." Pet. App. 30. Put another way, a cost that is attributable to a decision that must be made without regard to economic impact logically should be excluded from consideration of the economic impact of another, analytically distinct decision that will impose its own incremental costs.

Similarly, this Court has held that an environmental impact analysis or environmental assessment under the National Environmental Policy Act should consider only impacts that are caused by the agency

action for which the impact analysis is required, not impacts that result from another "legally relevant cause" and that will occur regardless of whether the agency action takes place. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004). Just as the informational and decisionmaking benefits of NEPA would be ill served by considering impacts not attributable to the agency action in question, the goals of the ESA in providing that economic impacts be considered in making habitat designations, but not in species listings, would be ill served if the agency's economic analysis considered economic impacts the "legally relevant cause" of which is the listing rather than the habitat designation.

Nonetheless, the Cattle Growers argue that if FWS designates critical habitat for a species at the same time the species is listed as threatened or endangered, "there is no regulatory baseline against which the economic impacts of designating critical habitat can be compared." Pet. 29. In addition to being unrelated to the facts of this case, where the two decisions were *not* simultaneous, this argument makes no sense. There is no reason why FWS could not separate out those economic costs associated with the listing itself (which the agency cannot consider in determining whether to list the species) from those additional costs associated with the critical habitat designation (which the agency is to consider in the habitat designation). As explained by the Ninth Circuit, "we see little inconsistency with the FWS's considering the burdens imposed by the critical habitat designation while taking into account those necessarily imposed by the listing decision even in these circumstances." Pet. App. 32.

In sum, FWS's baseline approach is fully consistent with the statutory scheme, and as such is eminently reasonable and has been repeatedly upheld by the courts following the Ninth Circuit's decision in *Gifford Pinchot*.

II. FWS' Determination of Which Areas Are "Occupied" by the Mexican Spotted Owl Is Reasonable, and the Court of Appeals Utilized No New Rationales in Upholding It.

The Cattle Growers claim that FWS improperly determined which areas are "occupied" by the Owl, resulting in an over-large critical habitat designation, and that the court of appeals erred by approving this designation based on a different rationale from that used by the agency. Pet. 31. FWS's determination of which areas are "occupied" by the Owl, however, fits squarely within the agency's scientific expertise, and is therefore entitled to deference under the Administrative Procedure Act's standard of review. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts."). The court of appeals did not use a different rationale to uphold the agency's rule, and FWS' factual determinations on this issue are reasonable, supported by the record, and not worthy of review by this Court.

A. The ESA Requires Timely Critical Habitat Designations Based on the Best Available Data.

The ESA requires FWS to designate critical habitat "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2). The "best available data"

standard has been called "the mantra of the [ESA]." *Blue Water Fisherman's Ass'n v. Nat'l Marine Fisheries Serv.*, 226 F. Supp. 2d 330, 338 (D. Mass. 2002). This standard has been consistently interpreted to require FWS to make its decisions solely on the basis of the best scientific and commercial data available, even where there remains some uncertainty. *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997) ("The [ESA's] 'best available data' standard . . . requires far less than 'conclusive evidence.'"). "Not only is acting in the face of scientific uncertainty appropriate in the conservation context, it is in fact *required* by the ESA." Kristen Carden, *Bridging the Divide: The Role of Science in Species Conservation Law*, 30 Harv. Envtl. L. Rev. 165, 190 (2006) (emphasis in original).

The reason the ESA does not permit FWS to delay making decisions such as critical habitat designations until it has gathered conclusive scientific data is that some species may not be able to wait. In enacting the ESA, "Congress clearly intended that [agencies] give 'the highest of priorities' and the 'benefit of the doubt' to preserving endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987), quoting *TVA v. Hill*, 437 U.S. 153, 174 (1978) The statutory standard requiring that agency decisions be based on the best available science, rather than absolute scientific certainty, is in keeping with the intent of Congress in crafting the ESA, as the legislative history "contains ample expressions of Congressional intent that preventative action to protect species be taken sooner rather than later." *Defenders of Wildlife*, 958 F. Supp. at 679-80.

Congress thus established strict timelines for several provisions of the ESA, including the requirement that critical habitat must generally be designated concurrently with the listing of species as threatened or endangered. 16 U.S.C. §§ 1533(a)(3)(A)(i), 1533(b)(6)(C). If such habitat is "not then determinable," the ESA allows a delay in designation of "not more than one additional year." 16 U.S.C § 1533(b)(6)(C)(ii). Further delays are not permitted. By the end of the one additional year, FWS must publish a final critical habitat designation "based on such data as may be available at that time." *Id.*

Here, the Owl was listed as threatened with extinction in 1993, over 17 years ago. 58 Fed. Reg. 14,248 (March 16, 1993). The agency was therefore required to designate critical habitat, based on such data as was available at that time. Instead, the agency took another 10 years to act. The Cattle Growers' demands for perfection in a process that has already taken far too long run counter to the ESA's strict timelines, its demand that the benefit of doubt be afforded to listed species, and its requirement that the FWS base critical habitat designations on the data that is already available. These goals demand that courts give the agency appropriate latitude in designating critical habitat.

B. FWS Properly Designated "Occupied" Critical Habitat, and the Court of Appeals Did Not Use a Different Rationale in Approving It.

As demonstrated by the 2004 Final Rule, FWS considered the best available science in designating critical habitat for the Mexican spotted owl, and pro-

vided habitat protection for specified areas on federal lands where the threatened species is known to occur or likely to occur. FWS's decision is reasonable, especially in light of the intent and purposes of the ESA, and should be upheld.

The ESA does not define "occupied" or "geographical area occupied by the species," and thus FWS's interpretations of those phrases are entitled to deference. *See* Pet. App. 9-10; *Cape Hatteras, supra*, 344 F. Supp. 2d at 119-120. As recognized by the Ninth Circuit, the word "occupied" "does not provide a clear standard for how frequently a species must use an area before the agency can designate it as critical habitat." App. 9, citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 548 n. 14 (1987) (explaining that there is no plain meaning to the phrase "public lands which are actually occupied"); *see also Cape Hatteras, supra,* 344 F. Supp. 2d at 120 (stating that FWS "does not have a regulation that imposes a single definition of 'occupied' for all species; rather, [FWS] has retained flexibility and defines the term differently depending on a given species' characteristics"); Pet. App. 216 ("Habitat is often dynamic, and species may move from one area to another over time.").

Moreover, as the court of appeals put it, FWS's determination "whether a species uses an area with sufficient regularity that it is 'occupied' is a highly contextual and fact-dependent inquiry." Pet. App.10.

> Relevant factors may include how often the area is used, how the species uses the area, the necessity of the area for the species' conservation, species characteristics such as the degree of mobility or migration, and any other factors

> that may bear on the inquiry. Such factual questions are within the purview of the agency's unique expertise and are entitled to standard deference afforded such agency determinations.

Pet. App. 10; *see also Cape Hatteras*, 344 F. Supp. 2d at 120 (stating that "because this Court has no expertise when it comes to determining which lands a [species] does or does not occupy," it should defer to the expertise and reasonable interpretation of FWS).

The Cattle Growers' primary complaint is that much of the designated critical habitat is located outside of the Owl's "Protected Activity Centers" ("PACs"), which are areas around the Owl's *known* nest sites. Pet. App. 35. Such a fact-specific claim of error is, of course, particularly ill-suited for review by this Court. In any event, FWS repeatedly explained in the 2004 Final Rule that the Owl uses and requires additional habitat outside of the PACs in order to fulfill its habitat needs:

- "Areas outside of PACs, including restricted areas, provide additional habitat appropriate for foraging." Pet. App. 88;
- "Owls are highly selective for roosting and nesting habitat, but forage in a wider array of habitats." Pet. App. 90;
- "Juvenile owls disperse in September and October, into a variety of habitats ranging from high-elevation forests to pinyon-juniper woodlands and riparian areas surrounded by desert grasslands." Pet. App. 91;
- "Owl foraging habitat includes a wide variety of forest conditions, canyon bottoms, cliff faces, tops of canyon rims, and riparian areas." Pet. App. 92;

- "Restricted habitat includes areas outside of protected habitat which owls utilize for foraging and dispersing." Pet. App. 100-01;

- "We consider protected areas to be occupied on a more permanent basis and restricted areas are considered to be temporally occupied. We have included these areas in the designation based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they currently possess the essential habitat requirements for nesting, roosting, foraging, and dispersal." Pet. App. 121;

- "Restricted habitat includes mixed-conifer forest, pine-oak forest, and riparian areas adjacent to or outside of protected areas. These habitat areas are used by resident (*i.e.*, territorial) owls for foraging, since the 600 acres recommended for PACs include on average 75 percent of nighttime foraging locations of radioed birds. The restricted areas also provide habitat for non-territorial birds (often referred to as 'floaters'), to support dispersing juveniles ...." Pet. App. 218-19.[1]

FWS's decision to include in the critical habitat designation areas that provide all of the habitat needs of the Owl, as opposed to just its nesting habi-

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[1] Moreover, FWS specifically chose not to include in the critical habitat designation "some areas that are known to have widely scattered owl sites, low owl population densities, and/or marginal habitat quality." Pet. App. 234.

tat, is entirely reasonable and consistent with the purposes of the ESA.

The Cattle Growers allege that the court of appeals utilized different and speculative rationales in upholding the agency's decision, namely: 1) that there are likely additional Owl nesting sites beyond PACs; and 2) that Owls need foraging and other habitat beyond nesting habitat found in PACs. Pet. 36. The Cattle Growers' assertion amounts to a claim of mere error by the court of appeals; even if their claim were taken at face value it would fall far short of identifying an issue important enough to require review by this Court. *See* S. Ct. R. 10. And the claim cannot be taken at face value in any case, because the reasons relied on by the court were not new rationales it invented, but were the very ones utilized by FWS.

First, the court of appeals' determination that there are likely Owl nesting sites beyond existing PACS is not "simply speculation," but is fully supported by the record. *See* Pet. App. 93 (Final Rule: "Additional surveys are likely to document more owls on [Forest Service] and other lands. For example, Geo-Marine (2004) reported an additional 26 activity centers not previously designated by the Gila National Forest."). Moreover, as the court of appeals recognized, one study estimated that there are 2,950 Owls in just the Upper Gila Mountains Recovery Unit, exclusive of tribal lands—well more than twice the total number of existing designated PACs in the entire range of the species. Pet. App.18; *see* Pet. App. 420. Indeed, it would be utterly astonishing if, as the Cattle Growers' argument suggests, the FWS claimed to have located *every* nest used by the Owl over the thousands of square miles of forests, moun-

tains, canyons, and chapparal within its range. Suffice it to say that the FWS itself said exactly the opposite—that there were many owl nesting sites it had *not* pinpointed—and the court of appeals relied on the agency's rationale, not its own substitute.

Second, as already detailed, far from creating the rationale that Owls need areas beyond their nesting habitat in PACs for foraging and other uses, the court merely accepted scientific determinations on which FWS itself clearly relied in designating areas beyond PACS as critical habitat. *See* pages 23-24 *supra*.

Finally, even if there were any merit to the Cattle Growers' challenges to the agency's determination that the Owl "occupies" the designated habitat, that would not suffice to justify overturning the agency's habitat designation rule. The ESA specifically allows FWS to designate *unoccupied* areas that are determined by the agency to be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). And in addition to determining that all areas designated as critical habitat for the owl are occupied, FWS further determined that all areas designated are "essential for the conservation of the species." Pet. App. 102 ("All of the areas that are designated as critical habitat contain primary constituent elements and are considered essential for the conservation of the species."). Thus, the agency lawfully included all the areas in the critical habitat designation whether or not they are considered "occupied."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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